BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2017-32-E

In Re:	)	
	)	
3109 Hwy. 25 S. L.L.C. d/b/a 25 Drive-In and Tommy McCutcheon,	)	
	)	**PROPOSED ORDER OF DUKE ENERGY CAROLINAS, LLC**
Complainant/Petitioner,	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC	)	
	)	
Defendant/Respondent.	)	

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Complaint of 3109 Hwy. 25 S. LLC. d/b/a 25 Drive-In and Tommy McCutcheon ("Complainant") claiming that Duke Energy Carolinas, LLC ("DEC" or the "Respondent") is charging Complainant's business under the wrong rate schedule and that the business should be charged under the "Greenwood Rate."

A hearing was held in this matter on April 5, 2017 and April 19, 2017. Complainant was represented by Alexander G. Shissias and John J. Fantry, Jr., of The Shissias Law Firm, L.L.C. DEC was represented by Rebecca J. Dulin, Esquire and Frank R. Ellerbe, III of Sowell, Gray, Robinson, Stepp & Laffitte, LLC. The Office of Regulatory Staff ("ORS") was represented by Jeffery M. Nelson, Esquire. In support of the complaint Complainant presented testimony from Tommy McCutcheon, Carolyn McCutcheon and James R. Calhoun and exhibits that were marked Hearing Exhibits 1 through 4. DEC presented testimony from Douglas T. Fowler, Jesse Gonzalez, Theo Lane and Joel Lunsford and Hearing Exhibits 5 through 9. The ORS presented testimony from April Sharpe.

The Greenwood Rate

The Greenwood Rate, which is at the center of the dispute before this Commission in this proceeding, is a product of Act No. 1293, 1966 S.C. Acts 3294. ("the Act" or "Act 1293"). The Act was adopted to approve a contract negotiated between the Greenwood County Electric Power Commission ("GEPC") and DEC's predecessor, Duke Power Company ("Duke Power"), by which Duke Power acquired the facilities of GEPC. The Act included the following provision regarding the rates to be charged to customers who were being transferred:

> The rates to be charged for electric power for all connections which exist at the consummation of the sale shall be the lower of the rates charged by the Greenwood County Electric Power Commission and Duke Power Company and the same shall not be grounds for any claim alleging discrimination. The rates to be charged for electric power for connections after the date of the sale shall be the applicable rates of Duke Power Company. As used herein the word "connections" shall be deemed to mean the physical connection of a resident or business establishment and shall have no reference to the person or business firm occupying the premises so connected, and the benefit of the lower rate shall continue although the person or firm occupying such premises may change from time to time.

At the time that the contract between GEPC and Duke Power was negotiated and approved by the Act it was the general expectation that electricity rates would continue to decline and would not be increasing. See Duke Power Co. v. South Carolina Public Service Commission, 284 S.C. 81, 326 S.E.2d 395, 400 (1985). Because that expectation turned out to be dramatically incorrect, there has been considerable litigation concerning the application of the provision of the Act that allows some customers to continue to be charged under the rates charged by GEPC in 1966. That rate has come to be known as the "Greenwood Rate" and it remains much lower than the comparable DEC rates approved by this Commission.

The leading case construing the Greenwood Rate provisions of the Act is Payne v. Duke Power Co., 304 S.C. 447, 405 S.E.2d 399 (1991). In Payne, the South Carolina Supreme Court

affirmed a circuit court ruling in favor of Duke Power in a class action lawsuit brought on behalf of three subclasses of customers who had been transferred by Duke Power from the Greenwood Rate to the then-applicable Duke rate. The three subclasses were: (a) those transferred as a result of a rate comparison process; (b) those transferred because of a change in the character of the connection; and (c) those transferred as a result of a change in the use of the premises from residential to commercial. The Supreme Court affirmed the circuit court's rulings on all three subclasses, relying heavily on this Commission's interpretation of the Act and stating the following about subclasses (b) and (c):

> With reference to customers in subclasses (b) and (c), we agree with the trial court that a change in either the character of the connection (e.g. from single to three phase) or use of the premises (e.g. from residential to commercial) constitutes a new connection effectuating a transfer to Duke rates. As stated in the contract, "[t]he rates to be charged ... for connections after the date of the sale shall be the applicable rates of Duke Power Company."

Payne, *supra* pp. 401-402.

With respect to the McCutcheon claim, it is subclass (b) that is most relevant. For purposes of determining when there has been a "change in the character of the connection" the Commission will consider the detailed order of the circuit court ("Circuit Court Order") affirmed on all issues by the Supreme Court in the Payne case.[1] The Circuit Court Order is a 43-page detailed discussion of all aspects of the Greenwood Rate. It was issued after a non-jury trial in 1990 in litigation that began initially in 1980 and includes an in-depth examination of the Commission's interpretation of the Act: "The evidence adduced through four former General

[1] At the hearing on this matter DEC asked this Commission to consider the Circuit Court Order. McCutcheon objected. As discussed in the body of this order, the Circuit Court Order is a thorough and extensive examination of Greenwood Rate issues that was affirmed on all points by the Supreme Court. In City of Orangeburg v. Moss, 262 S.C. 299 (1974) the opinion of the Supreme Court held that orders of the circuit court and this Commission were persuasive but not binding authority. The Commission will follow that ruling and consider the Payne Circuit Court Order as persuasive authority.

Counsels for the PSC, i.e., Austin, Lightsey, Bowen and Bockman, clearly illustrates the interpretation of Act 1293 and administration of same by the PSC." Circuit Court Order p. 28. The Circuit Court Order makes the following findings about subclasses (b) and (c):

> 35. In addition to the bill comparison procedure, there were two other reasons accounts were changed to the applicable Duke rates. **The first was when the customer's electrical needs changed, requiring changes in the equipment Duke had to provide to serve the premises. This was a "new" connection, and under the terms of Act 1293 and PSC Order No. E-976, the standard Duke rate was thereafter applicable to the location.** Approximately 600 locations were transferred for this reason. The second was where the character of the customer's premises changed from one service classification to an entirely different one, such as residential to commercial. There were four instances of such a change.
> 36. These conversions took place because the language of Act 1293 referred specifically to the connection as it existed on the date of the sale. **Any subsequently changed connections requiring increased investment in the service facilities by Duke was a "new" connection and the Act required that it be placed on the applicable Duke rate schedule.** After the sale the old Greenwood County rate schedules were unavailable to "new" connections, according to the terms of the Act and the July 13, 1966 Order of the PSC. The Public Service Commission's order in this regard provides: "IT IS FURTHER ORDERED, that no new customers shall be billed under the attached (Old Greenwood County) rate, and that whenever a customer is disconnected for any reason, the proper Duke rate shall be applied when the customer is reconnected." The old Greenwood County rate schedules available to "old" connections were closed on July 1, 1966.

Circuit Court Order pp.18-19. (Emphasis supplied.)

By the terms of the Act, as interpreted and applied since 1966 and affirmed by the Supreme Court in Payne, a change in a customer's needs that requires a change in the facilities used by the Company to provide service to that customer means that the customer is no longer eligible for the Greenwood Rate.

Findings of Fact

1. Complainant operates a drive-in movie theater in Greenwood, South Carolina located on Highway 25 South. The drive-in is served by DEC. It was first opened in the 1940s and was purchased by Complainant in 2008. Tr. Vol. I, p. 28.
2. The drive-in location had been served under the Greenwood Rate prior to Complainant's purchase and the Greenwood Rate was allowed to continue after the purchase of the location by Complainant. Tr. Vol. I, p. 29.
3. Prior to the purchase of the drive-in by Complainant it had not operated in 25 years. Tr. Vol. I, p. 46 lines 17 through 20. At the time of the purchase there was one outdoor screen. Complainant added a screen in 2008 and another in 2016 as well as additional projection equipment to show additional movies. Complainant also installed new cooking equipment including a grill, popcorn popper, deep fryer and other appliances. Tr. Vol. I, p. 33 line 3 through p. 34 line 4.
4. On Saturday, May 30, 2015, at approximately 10:00 p.m., the drive-in experienced a power outage. A DEC report relating to the incident was entered into evidence as part of Hearing Exhibit 5. That report states that there was a call from the customer about the incident, which the report summarized as: "cust. states power out, there was a very bright spark, cable looks burned from pole to meter." On cross examination, Tommy McCutcheon agreed that this record was an accurate description of what happened. Tr. Vol. I, p. 37, lines 5-11.
5. A DEC crew responded to the outage and was able to restore power to the drive-in on the night of May 30th. The restoration was completed in time to allow the customers of the drive-in to resume their movies. Tr. Vol. I, p. 37, line 17 through p. 38, line 5.

6. On Saturday June 13, 2015, at approximately 9:40 p.m., the drive-in experienced another outage. A DEC report relating to the incident was entered into evidence as part of Hearing Exhibit 5. That report states that there was a call from the customer, which the report summarized as: "Cust states the line going from the pole to the building is on fire, cust contacted FD." When asked on cross examination if this was an accurate description of what happened, Tommy McCutcheon stated that the line was melting and smoking. Tr. Vol. I, p. 38, line 6 through p. 39, line 16.

7. A DEC crew responded to the second outage and restored service on the night of June 13, 2015. Hearing Ex. 5; Tr. Vol. II, p. 180 line 25 through p. 181 line 4.

8. Following the second outage the DEC Construction and Maintenance Supervisor for the area, Tommy Fowler, visited the drive-in. Mr. Fowler testified that he visited on Monday, June 15, 2015, and found that the side of a building had been smoked up. He concluded that the existing facilities were insufficient to handle the thermal demand of the drive-in and that the facilities needed to be upgraded or service disconnected. Tr. Vol. I, p. 113 lines 5 through 20; p. 118, line 21 through p. 120 line 6.

9. Mr. Fowler contacted Theo Lane who is employed by DEC as its Government and Community Relations Manager for the area including Greenwood. Fowler reported to Lane the concerns about service to the drive-in. Tr. Vol. II, p. 192 line 19 through p. 193 line 16. Lane explained to Tommy McCutcheon DEC's concerns about the facilities serving the drive-in, that an upgrade of the facilities was needed and that the upgrade would result in the drive-in losing the Greenwood rate. Tr. Vol. II, p. 201 lines 12 through 18.

10. In the initial discussions between Lane and McCutcheon, McCutcheon refused to agree to an upgrade of facilities if it meant that the drive-in would be transferred from the Greenwood Rate to DEC rates. T. Vol II, p. 201 lines 12 through 22. On Wednesday, June 17, 2015, DEC disconnected service to the drive-in. Tr. Vol. I, p. 202 lines 4 through 8.

11. Later on June 17th Mr. and Mrs. McCutcheon met with Lane and Fowler and reached an agreement that the facilities serving the drive-in would be upgraded, that service would be restored and that the drive-in would be transferred from the Greenwood Rate to the appropriate DEC rate schedule. That agreement was reduced to writing and submitted into evidence by McCutcheon. Hearing Exhibit 1. DEC crews were able to upgrade the facilities and restore service on June 18, 2015. Tr. Vol. II, p. 202 line 19 through p. 203 line 2.

12. The upgrade of the facilities included replacing a 25 KVA transformer with a 50 KVA transformer and replacing one run of 2/0-3 aluminum triplex wire with two runs of 4/0-3 aluminum triplex wire. Tr. Vol. I, p. 120 lines 15 through 20. Complainant's expert witness, James R. Calhoun, agreed that the new facilities were much heavier duty than the facilities that were replaced. Tr. Vol. I, p. 98 line 21 through p. 99 line 12.

13. On June 16, 2015, Mrs. McCutcheon called the ORS to make a complaint about the disconnection and transfer of the drive-in from the Greenwood Rate to the DEC rate. The Complainant introduced into evidence the ORS records relating to the complaint. Hearing Exhibit 3. The ORS record shows that the complaint was closed on June 18, 2015. Hearing Ex. 3, p. 1. April Sharpe, Program Manager for the ORS Consumer

Services Department, testified that DEC provided ORS with the June 18, 2015 agreement (Hearing Ex. 1) and that it was the understanding of ORS that the matter had been resolved. Tr. Vol. II, p. 294 line 7 through p. 295 line 15.

14. The Complaint in this matter was filed with this Commission on January 27, 2017. Beginning in June, 2015 Complainant has been charged the DEC rate. During that time Complainant expanded its business to include a third screen and projection equipment for the drive-in. Tr. Vol. I, p. 71 lines 3 through 12.

15. The outages at the drive-in on May 30 and June 13, 2015 were caused by the energy demand of the drive-in overloading the thermal capacity of the facilities that were being used to provide service to the drive-in at that time. Following is the evidence that supports this finding:

    a.) Both outages occurred because the lines delivering power to the drive-in melted or caught on fire. Tr. Vol. I, p. 37 lines 5 through 11; Tr. Vol. I, p. 118 lines 5 through 20; Tr. Vol. I, p. 97 line 22 through p. 98 line 4.

    b.) Both outages occurred on a Saturday night when movies were being shown and cooking and air conditioning equipment was in use. Tr. Vol. I, p. 36 lines 7 through 24; Tr. Vol. I, p. 38 lines 13 through 20. Complainant's expert witness, Calhoun, agreed that both outages occurred during a period of peak demand for the drive-in. Tr. Vol. I, p. 99 line 15 through p. 100 line 23.

    c.) DEC expert witness Joel Lunsford described the concept of thermal overload and how it explains the two failures of the lines that served the drive-in. Lunsford testified that the line in place at the time of the outages was rated for a load of 185 amperes. Tr. Vol. II, p. 247 lines 8 through 13. Lunsford explained that he

calculated the demand of the drive-in at the time of the outages to be 225 amperes or 122% of the rating of the lines. Tr. Vol. II, p.247 line 8 through p. 248 line 4.

d.) DEC presented the testimony of Jesse Gonzalez, who works as a distribution lineman, and who was part of the DEC crew that responded to the outage at the drive-in on June 13, 2015. Gonzalez testified that he replaced the fuse on the pole-mounted transformer that served the drive-in and that the fuse that he replaced had melted. Tr. Vol. II, p. 179 line 20 through p. 181 line 1. Lunsford explained that the fact that the fuse melted showed that it was subjected to thermal overload like the wires. Lunsford testified that the melted fuse confirmed his opinion that the demand placed on the DEC facilities by the drive-in had overloaded the facilities that were in place to serve the drive-in. Tr. Vol. II, p. 254 lines 9 through 22.

16. Because the demand placed on the DEC facilities by the drive-in was too great for those facilities, it was appropriate for DEC to replace and upgrade the facilities as described by the DEC witnesses.

17. Complainant did not present any satisfactory explanation of the cause of the two outages suffered by the drive-in. Complainant presented Mr. Calhoun as its expert witness. In his pre-filed testimony Calhoun offered the opinion that the outages occurred because of the destruction of a current transformer. Tr. Vol. I, p. 88 paragraph 20. However, on cross examination Calhoun admitted that he never saw the current transformer and did not know whether it was destroyed. Tr. Vol. I, p. 95 line 24 through p. 96 line 4. He also said that "…when the fire – when the heating and melting of the wire occurred, it caused the CT to disintegrate there." Tr. Vol. I,

p. 97 lines 10 through 12. This testimony implicitly acknowledges that the precipitating event of the outage was the overheating of the wires. Mr. Calhoun also acknowledged that if wires were not properly sized for the load of the customer that the lines can overheat. Tr. Vol. I, p. 94 lines 13 through 22. He also admitted that a fuse not sized properly for the load could overheat. Tr. Vol. I, p. 94 line 23 through p. 95 line 23. In sum, Mr. Calhoun's testimony, taken as a whole, was consistent with the DEC explanation that the facilities serving the drive-in were insufficient to withstand the thermal load caused by the energy demand of the drive-in.

18. At the hearing (but not in his pre-filed testimony) Calhoun suggested that the failure of the pole mounted transformer might have been attributable to the fact that there were two other houses served by that transformer. That testimony however, offers no explanation for how the demand from the two houses could have contributed to the failure of the lines connecting the pole mounted transformer to the drive-in. As explained by Lunsford, the lines that melted and failed served only the drive-in and any energy demand from the two houses would have had no effect on those lines. Tr. Vol. II, p. 277 line 3 through p. 278 line 11. Accordingly, the energy demand of the two neighboring houses is irrelevant to the matter presented in this proceeding.

19. The June 18th upgrade of the facilities serving the drive-in was a change in the character of the connection that constitutes a new connection as that term is used in Act 1293.

20. The agreement signed by the McCutcheons and the DEC representatives on June 17, 2015 (Hearing Ex. 1) is not a binding contract which requires the Complainant to accept the transfer from the Greenwood Rate if the transfer is not required by the

provisions of the Act. However, the agreement is evidence that the McCutcheons knew that an upgrade in service would disqualify them from the Greenwood Rate. See Tr. Vol. I, p. 35 lines 8 through 21.

Conclusions of Law

1. This Commission has jurisdiction over this matter involving the interpretation of Act 1293. Payne v. Duke Power Co., *infra* at footnote 6.
2. The upgrade of the facilities serving the drive-in was caused by a change in the customer's electrical needs, requiring changes in the equipment necessary to provide service.
3. The change in facilities was a change in the character of the connection and it constituted a "new' connection as described in Act 1293.
4. Complainant has not been qualified to be charged at the Greenwood Rate since June 18, 2015, and it was properly transferred to the applicable DEC rate on that date.
5. DEC's actions in disconnecting service to the drive-in on June 17, 2015 were authorized by 10 S.C. Code Ann. Regs. 103-342(a). There had been two incidents in which the wires providing service to the drive-in melted or caught on fire, and DEC personnel had determined that its facilities were insufficient to handle the demand placed on them by the drive-in. There was clearly a hazardous or dangerous situation at the drive-in and DEC was authorized to terminate service immediately. This conclusion is not affected by the fact that a complaint about rates had been submitted to the ORS. This Commission holds that 10 S.C. Code Ann. Regs. 103-345(B) must be read together with S.C. Code Ann. Regs. 103-342(a). An electric utility that is confronted by a hazardous or dangerous situation requiring disconnection of service

cannot be prevented from performing the disconnection by the filing of a complaint. The appropriate remedy for a customer that believes that it is being charged the wrong rate is to submit a complaint to this Commission as Complainant has done in this proceeding.

WHEREFORE, for the reasons stated above, the relief requested by the Complainant is denied and IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

Swain E. Whitfield, Chairman

ATTEST:

Comer H. Randall, Vice-Chairman

(SEAL)